University of Southern California *and* California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Case 31-CA-11272

January 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 26, 1981, by California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, herein called the Union, and duly served on University of Southern California, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on July 24, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 22, 1981, following a Board election in Case 31-RC-4721, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about June 10, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 3, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 14, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 24, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its opposition to the Motion for Summary Judgment, as in its answer to the complaint, Respondent contends that it is not obligated to bargain with the Union because the certification issued to the Union in Case 31-RC-4721 is invalid by reason that the Board erroneously denied Respondent's request to set aside the election and order a new election. The General Counsel submits that Respondent's contention should be discounted as an attempt to relitigate issues which were or could have been disposed of by the Board in the prior representation proceeding. We agree.

A review of the entire record, including that in Case 31-RC-4721, reveals that on April 16, 1980, the Regional Director for Region 31 approved a Stipulation for Certification Upon Consent Election executed by the Union and Respondent. Pursuant to this, a secret-ballot election was held on June 6, 1980, which resulted in a tally of 20 votes for, and 19 against, the Union, with 1 determinative challenged ballot. Following the election, the parties signed an agreement stipulating that the employee who had cast the challenged ballot was ineligible to vote. In view of this agreement, the parties received a corrected tally of ballots.

On June 13, 1980, Respondent, by letter, filed with the Regional Director six timely objections to conduct affecting the results of the election. The Regional Director issued his Report on Objections on July 31, 1980, recommending that all six objections be overruled without a hearing. Thereafter, Respondent filed timely exceptions to the Regional Director's recommendations regarding its Objections 1 through 5.

On October 21, 1980, the Board issued its Decision and Direction, which adopted the Regional Director's findings and recommendations, except that it remanded for hearing the issues raised by Respondent's Objection 5. On November 6, 1980, Respondent filed an untimely motion for reconsideration of the Board's Decision. On November 7, 1980, the Board denied Respondent's motion as untimely.[2]

[1] Official notice is taken of the record in the representation proceeding, Case 31-RC-4721, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In our Decision and Direction, issued on October 21, 1980, we stated: *Continued*

On November 14, 1980, the Regional Director issued a notice of hearing on objection. Thereafter, a hearing regarding Respondent's Objection 5 was held on December 10 and 11, 1980. On February 26, 1981, the Hearing Officer issued a report, recommending that Respondent's objection be overruled and that a certification of representative be issued. The Hearing Officer's findings and recommendations were adopted by the Board on May 22, 1981, when it issued its Decision and Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

Thereafter, the Union, by letter dated May 26, 1981, requested that Respondent meet and confer with it for the purposes of collective bargaining. Respondent, by letter dated June 10, 1981, acknowledged receipt of the Union's letter and stated it refused to recognize and bargain collectively with the Union because it considered the Union's certification to be invalid.

In its answer, and in its response to the Notice To Show Cause, Respondent alleges four affirmative defenses. As a first affirmative defense, it alleges that the Regional Director, in his Report on Objections, improperly recommended that each of said objections be overruled and that a certification of representative be issued. As a second affirmative defense, Respondent alleges that the Board erroneously sustained the Regional Director's recommendations as to Objections 2, 3, and 4 and that it erroneously failed to respond to Respondent's exception to the Regional Director's recommendation that Objection 1 be overruled. As a third affirmative defense, Respondent alleges that the Hearing Officer, in her Report on Objections and Recommendations, improperly recommended that Respondent's Objection 5 be overruled and that a certification of representative be issued to the Union. As a fourth affirmative defense, Respondent alleges that the Board erroneously adopted the Hearing Officer's findings and recommendations and improperly issued a certification of representative to the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation, maintaining its principal place of business in Los Angeles, California, where it is now and continuously has been engaged in the operation of a nonprofit university. Its annual gross revenues exceed $1 million. Annually, it purchases and receives goods or services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations, except that it finds that substantial issues of fact and law have been raised regarding the conduct described in Objection 5, which can best be resolved after a hearing.

Thus, we made it clear that Respondent's Objections 1 through 4 and 6 had been overruled. However, since we wanted to clarify our holding as to Objections 2, 3, and 4, we added a footnote that specifically addressed each of these.

Respondent's motion for reconsideration alleged that the Board failed to address its exception to the Regional Director's recommendation as to Objection 1. We denied this motion as untimely. However, even if it had been timely filed we would have denied it. Merely because we did not specifically address Objection 1 in a footnote does not mean that we failed to rule on it. In our Decision and Direction we considered Objection 1 and the Regional Director's disposition of it, and, after reviewing the record in light of the exceptions and brief, adopted his recommendation that it be overruled.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

2. The certification

On June 6, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 22, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 26, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 10, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 10, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. University of Southern California is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 2, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective

bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 10, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, University of Southern California, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its University Park and Health Sciences campuses copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Repondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All parking lot attendants and utility attendants employed by us at our University Park

and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

UNIVERSITY OF SOUTHERN CALIFORNIA